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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,
Petitioner,

vs.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION OF THE COMPTROLLER OF THE CURRENCY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED[1]

1. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida constitute branch banking in violation of the

1. References to the Appendix of this Brief are designated "A." The Petition for Certiorari filed on behalf of the Comptroller of the Currency is identified as "Pet." and the Appendix thereto as "App."

National Bank Act[2] and state branching law incorporated therein?

2. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida violate federal and Florida banking law?

STATUTES INVOLVED

In addition to the statutes cited by Petitioner Comptroller of the Currency, Florida Statute Section 659.06 (2)[3] is involved:

> "(2) . . . The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); . . . ."

STATEMENT OF THE CASE

Respondents incorporate by reference herein the Statement of the Case contained in Respondents' Brief in Opposition to the Petition of The First National Bank in Plant City for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (No. 777, this Term).

REASONS FOR DENYING THE PETITION

Petitioner Comptroller seeks to cast the decision below as a power struggle by state banking authorities to exert control over all off-premises activities of national banks in derogation of the federal laws and banking authority. In so doing, the Comptroller ignores the basic, factual is-

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2. *McFadden Act*, §§7 and 8, 44 Stat. 1228-29 (1927), as amended, *Glass-Steagell Act*, §23, 48 Stat. 189 (1933), as amended, 12 U.S.C. §36 (1964).

3. Laws of Florida, Ch. 28016, §659.06(2) at 81 (1953), as amended, Laws of Florida, Ch. 276 (1965) (A. 1-2).

sue involved in this case, thereby presenting a misleading characterization of the decision sought to be reviewed. In essence, the Court of Appeals, being aware of the practicalities of the banking business, held that branchness is a matter of function rather than label. Refusing to be bound by the form of Petitioner Bank's off-premises banking operations, the Court of Appeals considered their substance. Accordingly, the Court below concluded that the off-premises armored car and shopping center depository operations of Petitioner Bank constitute branch banking in violation of the federal and Florida branching laws.

It is imperative to recognize the true nature and extent of the off-premises banking operations herein. What Petitioner Comptroller vaguely describes as off-premises agency activities are in fact bank operations *established for the purpose of receiving deposits and cashing checks off-premises.* These are, of course, the very banking operations defined in 12 U.S.C. §36(f) as constituting a branch.

Clearly Petitioner Bank is receiving deposits and cashing checks off-premises in contravention of federal and state branching law. The District Court expressly found that Petitioner Bank was cashing checks off-premises. Further, Petitioner Bank accepts possession of and complete responsibility for deposits off-premises. The Court of Appeals' determination that these particular off-premises banking operations constitute branch banking within the meaning of 12 U.S.C. §36 is correct and consistent with the federal statute and pertinent decisions.

Respondents respectfully submit that the decision of the Court of Appeals can be sustained on a number of different grounds. Indeed, under the facts involved, no other result could be reached.

ARGUMENT

I.

There Is No Important Question of Federal Law.

Since national banks are federal instrumentalities, Congress clearly could have barred the applicability of state law to national banks. Instead, Congress elected to follow a "policy of equalization" between national and state banks by expressly adopting state law in many important competitive areas. *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). Additionally, Congress did not, as a general rule, preclude the application to national banks of state law which does not conflict with federal law.[4] *McClellan* v. *Chipman*, 164 U.S. 347 (1896); *First National Bank* v. *Missouri*, 263 U.S. 640 (1924).

Thus, Congress has given a special significance to state law as applied to national banks in many areas of banking. This is especially important in view of the factual nature of the banking operations involved in this case. Nowhere has the congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in section 36(c) wherein Congress required the Comptroller of the Currency to follow state law as the standard for branching by national banks.

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4. In some instances, Congress has expressly limited state power over national banks. For instance, 12 U.S.C. §548 prescribes the only ways in which states can tax national banks. The recent decision of *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968), relied upon herein by Petitioner Comptroller, is concerned with construction of that statute. It was *not* held in that case, as stated by Petitioner Comptroller, that the activities of national banks are immune from state law unless expressly incorporated by federal law.

A. The decision of the Court of Appeals is consistent with the terms, policy, and legislative history of the federal branching statute.

Petitioner Comptroller asserts that state banking authorities are authorized under the decision below to determine the lawfulness of any off-premises activity of a national bank, and that an important federal question is thereby raised. However, Petitioner Comptroller's argument is premised on an incorrect and incomplete characterization of the decision of the Court of Appeals.

Petitioner Comptroller first asserts that the Court held that state law controls the "threshold determination" of what off-premises banking activities constitute a branch (Pet. at 2). The Court of Appeals did not so hold. It stated instead, and precisely to the contrary, that the threshold determination of branching is controlled exclusively by federal law.

The Fifth Circuit held that 12 U.S.C. §36(f) provides "'a partial, functional definition for determining *prima facie* if the supplementing state branching law should come into play.'" (App. 28). If the proposed off-premises operation possesses the characteristics of a branch within the meaning of section 36(f), the "threshold of federal law" has been passed over, and only then is state law turned to for a further consideration of its character (App. 31). Thus, the Court of Appeals clearly held that federal law, and *not* state law, controls the "threshold determination" of what off-premises activities of a national bank constitute a branch.

Nevertheless, Petitioner Comptroller repeatedly asserts that the decision below will permit a state to prohibit any off-premises activity of a national bank as branching (Pet. 11-13). Clearly this could not occur under the de-

cision sought to be reviewed.[5] State law prohibiting an off-premises banking activity as branching applies to national banks *only if* the activity in question first meets the test of branchness set forth in section 36(f) (App. 29). Many of the off-premises activities of national banks listed by Petitioner Comptroller, such as new-business solicitation and banking by mail, are not performed at an additional place of business; other activities, such as data processing, do not involve the functional characteristics of a branch because no customer service is involved. Such off-premises operations would not pass the threshold test of a branch under section 36(f), and could therefore not be prohibited to national banks by state branching law.

The holding of the Court of Appeals that section 36(f) provides a functional, threshold definition of a branch is consistent with the statutory language of that section. Congress defined a "branch" in terms of "include," which connotes an "illustrative application of the general principle" and *not* an all-embracing definition. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

That Congress intended section 36(f) to be a flexible, illustrative definition of a branch is further confirmed by its contemporaneous construction of the section. Representative McFadden stated that a branch was defined under section 36(f) as "any place outside of or away from the main office where the bank carried on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office. . . .*"

5. Petitioner Comptroller refers at page 12 to a recent ruling by the Georgia banking commissioner that "certain loan-production activities of a national bank" were illegal. The Commissioner simply ruled that the loan production offices established *by out-of-state banks* "for the purpose of performing any and all banking functions normally conducted by the parent bank with the exception of issuing checks" would constitute a branch bank in violation of the Georgia branching statutes (A. 3).

68 Cong. 5816 (1927) (Emphasis supplied). This characterization of a branch is, of course, much broader than the provisions of section 36(f) itself, demonstrating that Congress considered that definitional section to be inclusive rather than restrictive.

Disregarding the inclusive language actually employed by Congress in defining a branch, Petitioner Comptroller attempts to infer an inapposite Congressional purpose from language omitted from the statute. It is asserted that Congress would have expressly incorporated state law defining branching in section 36(f) if it had intended it to be applicable to national banks. This is, of course, the same argument urged by the National Comptroller in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), with regard to the applicability of state branching restrictions to national banks under 12 U.S.C. 36(c)(1). It prompted this Court to observe that "it is a strange argument that permits one to pick and choose what portion of the law binds him." 385 U.S. at 261. Petitioner Comptroller also made this same argument[6] in *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967), contending that construction of sub-section (h) was a purely federal question because state law defining state banks was not expressly incorporated in that section. The Court of Appeals for the District of Columbia rejected this argument, holding that section 36(h) should be interpreted in light of state policy and legislation since it is part of a federal statute reflecting a "pervasive policy of coordination." *Id.* at 705.

Petitioner Comptroller also states that Congress must have intended section 36(f) to be a restrictive definition because it governs not only the establishment of new

6. Contrary to Petitioner Comptroller's assertion (Pet. at 7), Congress did *not* expressly incorporate state law in either subsection (e) or (h).

branches but other matters as to which state law has no pertinence (Pet. at 6). However, Petitioner Comptroller is hoisted on his own petard. Since the definitional section relates to a variety of matters, it is more reasonable to assume, as did the Court below, that Congress incorporated a flexible definition of branching. As to the establishment of new branches by national banks, a matter controlled by state law, the test of branchness is two-fold; if the off-premises facility is a branch within the meaning of section 36(f), then state law is further considered to determine whether the facility is a branch. As to matters unrelated to state law, there is simply no need to take the second step of looking to state branching law.

It is asserted by Petitioner Comptroller that state law as to what is branching is irrelevant to national banks because Congress did not intend for the application of the branching conditions in section 36 to vary from state to state (Pet. at 8). The very language of section 36 refutes this assertion. It is provided there that the conditions upon which national banks may establish and operate branches are the following:

> "(c) . . . (1) Within (a municipality) . . ., *if . . . authorized to State banks by the law of the State in question*; and (2) at any point within the State . . . *if . . . authorized to State banks by the statute law of the State . . . and subject to the restrictions as to location imposed by the law of the State on State banks.*" 12 U.S.C. §36(c) (Emphasis supplied).

Manifestly Congress did intend for the conditions upon which national banks can establish and operate new branches to vary from state to state.[7]

7. Underlying section 36 is the Congressional recognition that each state is best able to decide what type of banking structure is best suited to its economy. Realizing that the economies vary widely from state to state and that what is suitable for a densely populated industrial state is not necessarily suitable for

Throughout the Petition herein, it is urged that there is a danger that states will enact "unfriendly legislation" and make "extreme use" of state branching law (Pet. at 12-13). This specter is illusory, however, since state branching law controls state banks as well as national banks. It is unlikely that any state would elect to cut off its nose to spite the face. On the other hand, if state law defining branching were inapplicable to national banks, then, as the Court below recognized, the National Comptroller could "by means of oracular definitions" distort what states considered branching into non-branching (App. 33). In this way, the United States Comptroller could give national banks a substantial competitive edge in the branching area, contrary to the specific purpose and policy of the federal branching act. *Clearly competitive equality cannot exist in the branching area if, in any given state, state and national banks are governed by separate and inconsistent definitions of branching.*

The decision below is finally portrayed by Petitioner Comptroller as causing an "unacceptable disruption of the administration of the federal banking laws." (Pet. at 14). The actual complaint of Petitioner Comptroller is that he will be required to consider state branching laws and, occasionally perhaps, even consult with state banking authorities regarding the establishment of new branches by national banks. Certainly this has not been the practice of the national Comptroller in recent years, and, to that extent, requires a change in the administration of the federal branching act. However, there is no reason why such a

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an agricultural state, Congress wisely adopted state standards to determine the conditions upon which national banks may establish and operate branch banks. With diffusion of regulatory authority among the 50 states, more freedom in the economy is assured than would be the case with a monolithic standard of banking. At the same time, no substantial privilege is given to banks in one system over those in another while competing in the same geographical area.

practice should be considered "unacceptable." On the contrary, it seems apparent that this is the only way in which there can be coordination of state and federal banking authorities so that competitive equality can be maintained in the branching area. *National Bank* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958).

B. The decision of the Court of Appeals is consistent with other decisions.

Petitioner Comptroller states that the decision sought to be reviewed conflicts with "the approach" taken by the Court of Appeals for the Ninth Circuit and the District of Columbia (Pet. at 9). Respondents submit that the cited cases involved completely different factual issues.[8] Further, there is no conflict whatsoever in principle.

In each of the cited cases, the issue was whether one bank was in fact doing business through the ostensible operation of another bank. If so, there was no dispute that the operation constituted an illegal branch bank. In *Camden Trust Co.* v. *Gidney*, 301 F.2d 521 (D.C. Cir. 1962), *cert. denied*, 369 U.S. 886 (1962), one national bank established a new bank as an affiliate. *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd*, 379 U.S. 411 (1965) and *First National Bank* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962), both involved operations of bank holding companies.

In *Camden* and *First Bank Stock Corp.*, there were separate banks involved with affiliated stock ownership

8. The question of whether the definition of branch contained in 12 U.S.C. §36(f) is exclusive or partial was not raised or determined in any of the above-cited decisions. However, the Court of Appeals for the District of Columbia recently utilized precisely the same approach as the Court of Appeals below in constructing the definition of state banks contained in 12 U.S.C. §36(h). *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967).

and, accordingly, no branching.[9] In *Whitney*, the Court of Appeals found that the old bank intended to do business through the facade of the new bank (both of which were to be owned by the same holding company), and that the new bank was in actuality a branch.[10] Although reaching different results, the courts of appeals for both circuits agreed that the corporate veil should be pierced whenever one bank is doing business through the other. The refusal of the court below to condone "paper evasions" of state branching law, which, by Congressional mandate, is federal branching law, is certainly consistent with this approach.

Petitioner Comptroller also contends that the decision below conflicts with the *Walker Bank* case. In this connection, Petitioner Comptroller asserts that the Court below held that the "definition of 'branch' in 12 U.S.C. 36(f) is rendered superfluous by state law concepts." (Pet. at 10). It is further stated that the Court below held that "Congress has remitted to the states the threshold question of defining the class of activities as to which there is to be 'competitive equality.'" (Pet. at 10-11). As previously noted, however, the Court of Appeals did *not* so hold. The Court below unmistakably held that section 36(f) controls *exclusively* the threshold determination of what activities constitute branching. Only if the activity is a "branch" within the meaning of section 36(f) does state law ever come into play. Thus, Petitioner Comptroller's assertion

9. The dissenting judge in *Camden* did *not*, as asserted by Petitioner Comptroller (Pet. at 9) state that the operation was defined as branching under state law; he did state, however, that state law prohibited branching and declared that "if substance rather than form is to prevail," the new bank should be held to be an illegal branch. *Id.* at 526.

10. The Supreme Court reversed on procedural grounds under The Bank Holding Company Act (12 U.S.C. §1841 *et seq.*), not the branching law. 379 U.S. 411 (1965).

of a conflict with *Walker Bank* is premised solely on unwarranted statements as to the holding of the Court below.

Petitioner Comptroller further attempts to show a conflict with the cases of *Howell* v. *Citizens First National Bank*, 385 F.2d 528 (3rd Cir. 1967) and *Union Saving Bank* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964), by stating that the Court below accepted the State Comptroller's ruling as the dispositive interpretation of an "unclear" state statute (Pet. at 13). Such an assertion flies directly in the face of the decision itself. Unlike Petitioner Comptroller, the Court of Appeals found Florida Statute §659.06 to be perfectly clear. It declared that "the Florida statute permits only one place of business, and *this direction is uncomplicated, unhedged, and unmodified.*" (App. 35) (Emphasis supplied). Continuing, the Fifth Circuit stated that "unless we were to cast away all concepts of the functional 'business' of a bank, *we would have to conclude that First National was 'doing business' with its extra services.*" (App. 35) (Emphasis supplied). The Court's construction of the statute is consistent with rulings of the State Comptroller. But the Court clearly did not, as stated by Petitioner Comptroller,[11] accept such rulings "as dispositive" without further analysis.

As the Court of Appeals recognized, Florida Statute §659.06 is not complicated. Sub-section (2), *which has been totally ignored by Petitioner Comptroller from the outset*, explicitly states that a bank drive-in or walk-up facility is authorized *only if it is located on the same property as the main banking house or on property contiguous thereto* (A. 1-2). Yet Petitioner Bank's walk-up depository facility is located in a shopping center about a mile away from its building (R. 75). It would seem to be beyond question that the establishment of this off-premises

11. Pet. at 5.

depository facility is in direct contravention of Florida Statute §659.06. Indeed, Petitioners have *never argued* to the contrary. Similarly, the armored car of Petitioner Bank, characterized by Petitioner Bank as "a 'mobile drive-in,'" operates as far as 18 miles away from its main banking house (R. 494-97; Exhibits C-F at R. 2097).

Florida Statute §659.06(1) distinctly provides that the business of a bank is to be performed only at its banking house and authorized drive-in or walk-up facilities (A. 1). Petitioner Comptroller has admitted that the pick-up of deposits and the delivery of currency off-premises constitutes the business of banking (R. 569-70).[12] As such, it is being performed off-premises in clear violation of the provisions of Florida Statute §659.06, and the Court of Appeals correctly so held.

II

The Decision Is Correct on Other Grounds.

The Court of Appeals implicitly held that Petitioner Bank is receiving deposits and cashing checks through its off-premises activities in violation of federal branching law. This holding is amply supported by the evidence and provides an additional ground upon which the decision below can be sustained.

A. Off-premises banking operations such as those performed by Petitioner Bank were intended by Congress to be prohibited as branching unless authorized by state law and the office of the Comptroller of the Currency so ruled prior to 1963.

Petitioner Comptroller states that national banks performed off-premises armored car operations, as well as

12. It is significant that there is an express provision in Florida Statute Section 659.06 authorizing banks to pick-up deposits for school savings plans at the school (A. 1-2). Clearly the Florida Legislature believed that the off-premises pick-up of deposits in any other situation was prohibited by Section 659.06.

other off-premises agency activities, prior to passage of the McFadden Act. It is urged that such activities must therefore not constitute branching since national banks had no power to branch prior to 1927. This contention has no merit. The legislative history of the federal branching act clearly establishes that *such off-premises agency activities were considered by Congress to be branch banking and to be permitted to national banks only if permitted to state banks under state law.*

In 1911, the United States Attorney General ruled that national banks could appoint agents "to receive and collect money and forward it to the bank." 29 Op. Att'y Gen. 81, 90 (1911). Subsequently, in 1924, the United States Supreme Court expressly held that national banks had no legal power to branch bank. *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). However, since the Attorney General's opinion was cited[13] in the *Missouri* decision, the Comptroller of the Currency interpreted that decision as "having application only to branch banks which do a complete banking business, and not to branch banks which only receive deposits and cash checks. . . ." 66 Cong. Rec. 1577 (1925). Accordingly, he continued to permit national banks to operate off-premises offices, agencies, and tellers' windows, even in states prohibiting branch banking. 67 Cong. Rec. 3232 (1926). As a result, the following situation confronted Congress prior to passage of the federal branching statute:

> "There are two conflicting decisions or opinions of the Attorney General, and *the decision of the Supreme Court has left uncertain the question of branches or*

13. A 1923 decision of the Attorney General held that national banks could establish off-premises offices for the performance of routine services such as the receipt of deposits and cashing checks. This opinion was partially disapproved by the United States Supreme Court in the *Missouri* case.

'financial comfort stations,' authorized by [Comptroller] Crissinger (laughter). Now the committee agrees that whatever may be our solution of it, . . . Congress should by affirmative action decide what are the rights of national banks to engage in branch banking." Representative Wingo, 66 Cong. Rec. 1777 (1925). (Emphasis supplied).

The legality of all of such off-premises activities was severely questioned by Congress.[14] Representative Nelson flatly declared that "branch banks, 'additional offices' or 'agencies,' or whatever may be the form of the transgression, when put to the test of the *Missouri* case, are clearly illegal." 67 Cong. Rec. 2841 (1926). Similarly, Representative Stevenson emphasized that, although there were existing branches of national banks "established by the dictum of the Comptroller of the Currency, *who has assumed to say that he can allow a national bank to establish as many agencies for receiving deposits and paying checks as he sees fit,*" this form of branching was cut out "root and branch" in the bill. 66 Cong. Rec. 1627 (1925) (Emphasis supplied).

Specifically included in the federal definition of a branch is any *agency* where "deposits are received, checks paid, or money lent." And, the legislative debates establish that Congress *fully intended to thereby limit the receiving of deposits or cashing of checks off-premises through the agency device.* Thus, there is no support for the assertion that Congress intended to draw a distinction in the McFadden Act between branch banking and the establishment of agencies to receive deposits and cash checks off-premises.

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14. See, for instance, 65 Cong. Rec. 11298 (1924); 66 Cong. Rec. 4410, 1577-78, 1632, 1779 (1925); 67 Cong. Rec. 3230, 3241 (1926).

Petitioner Comptroller further states, however, that national banks have long been performing armored car operations and that such off-premises bank operations have not been considered branch banking (Pet. at 12). *Written rulings of the office of the Comptroller of the Currency are directly to the contrary.* Until December, 1963, the National Comptroller ruled on numerous occasions that armored car operations exactly like those performed by Petitioner Bank herein constituted illegal branch banking[15] (R. 143-519). It was not until late 1963 that Comptroller of the Currency James J. Saxon ruled there was no violation of the federal branching act so long as the national bank utilized a contract stating that it was acting as agent for its customer.

B. Petitioner Bank is receiving deposits and cashing checks at its off-premises facilities.

Petitioner Comptroller states, without further discussion, that "the district court's finding that First National's activities do not constitute 'branching' is well-supported."[16] (Pet. at 15). Respondents submit that the Court of Appeals properly rejected the District Court's finding that Petitioner Bank is not branching. Recognizing that Petitioner Bank's use of the so-called "agency" and "de-

15. See, for example, letter rulings at R. 1466-67, 1477, which are set forth at pages 5-7 of the Appendix to Respondents' Brief in Opposition to the Petition for Certiorari filed by The First National Bank in Plant City [No. 777, this term].

16. Respondents believe it is important to recognize that the District Court rendered that holding in the face of its own finding that Petitioner Bank was cashing checks off-premises (App. 47). Moreover, the District Court's finding that the bank was not receiving deposits off-premises was premised on its ruling that the documents used by Petitioner Bank *conclusively established* as a matter of law that it was acting as agent for its customers (App. 44). Further, the District Court entered its summary judgment on the basis of limited and conflicting evidence of only five customers selected by Petitioner Bank (R. 986-91). Each of these matters was urged as error on appeal to the Fifth Circuit.

posits" forms is purely a device to evade the federal branching statute, the Court expressly refused to "aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language." (App. 32). Certainly the evidence establishes that Petitioner Bank is in fact receiving deposits and cashing checks at its off-premises bank facilities.

Petitioner Bank delivers currency from the bank to the premises of its customers by means of the armored car. When a check is given to the bank employee in exchange for the currency delivered to the customer, that check is cashed off-premises. *The District Court so found*[17] (App. 47). The fact that Petitioner Bank is cashing checks at its off-premises armored car renders the operation an illegal branch facility in direct contravention of section 36(f).

Petitioner Bank also receives deposits at its off-premises armored car and off-premises depository. It is contended, however, that the bank is not thereby branching because it uses deposit forms which state that the deposits are not *accepted* as such until they reach the banking house. In *State Chartered Banks* v. *Peoples National Bank*, 291 F. Supp. 180 (D.C. Wash. 1966), the District Court rejected a similar argument. The national Comptroller argued there that the national bank was not branching because "only a part" of the check-cashing process would be carried out at the branch facility. The District Court found that a branching facility did exist, however, because the *func-*

17. Nevertheless, the Court held that the armored car operations of Petitioner Bank are legally authorized since they are performed "in substantial compliance" with rulings of the office of the Comptroller of the Currency (App. 47). Accordingly, Respondent Comptroller of the State of Florida was enjoined from interfering with *any* part of the armored car operations (App. 51), *including that part found to be illegal branch banking by the District Court.*

tional act of check cashing was complete after *receipt* of the check and *payment* of the money.

It is significant that the Court of Appeals below stated that it subscribed to the *State Chartered Banks* decision "without hesitation" because the same situation is present here (App. 32). The *functional act* of *receiving deposits* is completed off-premises. Although some bookkeeping remains to be done at the bank, Petitioner Bank accepts *possession* of and *responsibility* for the deposits off-premises. Nothing remains for the depositor to do to complete the deposit.

The statement in the bank forms of Petitioner Bank that the bank deposits are *not* accepted as such until they reach the banking house is irrelevant to the question of whether the off-premises operation is branching. Section 36(f) expressly refers to the *receipt* of deposits and *not* the technical *acceptance* of monies as deposits.

Further, regardless of the "agency" forms, the evidence establishes that Petitioner Bank is not in fact acting as agent for its customers when it receives deposits and cashes checks off-premises. An agency relation does not exist merely because the parties designated their relationship as such, but only if the requisite factual characteristics are present. Restatement (Second) of Agency §1 at 8 (1957); *Bartels* v. *Birmingham*, 332 U.S. 126 (1947).

The term "agency" always imports dealings between two parties through the medium of one who has the power to bring about business relations between his principal and third persons. Petitioner Bank is not acting on behalf of its customers in matters involving third parties but, instead, solely in matters involving the bank itself. Control of the principal over the activities of his agent is another requisite factor in the principal-agent relationship. Yet

the customers of Petitioner Bank have *no* control over the armored car or the bank employees with regard to the performance of the off-premises banking transactions (R. 64-66). The primary obligation of the agent is to act for the benefit of the principal, but Petitioner Bank and its employees are *not* primarily obligated to act for the benefit of the customer. Thus, none of the factors of a true agency relationship are present in the instant case.

Although a bank and its customer have the legal right to make their own contract or arrangement, it is well-established that they may not simply "contract around statutory prohibitions or public policy." 10 Am.Jur.2d *Banks* §338 (1963). The contracts herein are entered into for the single, admitted purpose of evading the provisions of the federal branching statute. Respondents respectfully submit that the Court of Appeals properly refused to permit evasion of long-standing federal branching laws and federal policy of competitive equality between national and state banks in the matter of branching through such subterfuges.

C. There is no paramount federal law authorizing the off-premises banking operations of Petitioner Bank.

This Court has long held that state law generally operates upon the activities of national banks except when it conflicts with federal law. *McClellan* v. *Chipman*, 164 U.S. 347 (1896). Even assuming that the off-premises banking activities of Petitioner Bank are not within the definition of section 36(f), Respondents submit that Florida law prohibiting such operations is still "operable and controlling" because there is no paramount federal law authorizing such activities.[18] There is no express power under

18. Respondents sought to raise this matter in the District Court but that Court refused to rule upon it, stating that it was neither appropriate nor necessary to do so (App. 50). The Circuit

federal law. There can be no implied power under 12 U.S.C. §24 (seventh) (A. 2) since this Court has expressly held that "the mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business. . . ." *First National Bank* v. *Missouri*, 263 U.S. 640, 659 (1924). Respondents respectfully submit that the decision of the Court of Appeals can also be sustained for this reason.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

V. CARROLL WEBB
General Counsel to Comptroller
The Capitol
Tallahassee, Florida

CARLTON, FIELDS, WARD, EMMANUEL, SMITH, & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601

By .....
WM. REECE SMITH, JR.

Court did not pass on the question because of its conclusions on other issues. Likewise, the Circuit Court did not pass on various issues regarding the propriety of the summary judgment entered by the District Court and the severe limitations placed upon Respondents' discovery efforts.

APPENDIX

A. STATUTES

FLORIDA STATUTE § 659.06

659.06 Place of transacting business; school savings; drive-in facilities

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

(b) A bank may contract with proper authorities of any elementary or secondary school or institution caring for minors for the participation by the bank in any school or institutional thrift or savings plan, and it may accept deposits at such school or institution, either by its own collector or by any representative of the school or institution who becomes the agent of the bank for such purposes. Withdrawal from any account carried with the bank by any such school or institution shall be made only at the banking house of said bank.

(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main

banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965.

TITLE 12, UNITED STATES CODE § 24 (SEVENTH)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . . .

A3

January 21, 1969

Mr. Robert N. DuRant, Executive V-President
South Carolina Bankers Association
300 Columbia Building
Post Office Box 11299
Columbia, South Carolina 29211

Dear Mr. DuRant:

This is in reply to your letter of January 20, in which you request a copy of this Department's ruling on the legality of the establishment of loan production offices in this State by out-of-State banks pursuant to the interpretation announced by the Federal Reserve Board on August 14, 1968.

We are pleased to enclose a copy of our correspondence relating to the ruling by this Department that the establishment of loan production offices in this State for the purpose of conducting a banking business by out-of-State banks would be illegal.

This Department takes the position that loan production offices established for the purpose of performing any and all banking functions normally conducted by the parent bank with the exception of issuing checks would constitute a banking business, and as such, would be considered as a branch office.

Therefore, under the laws of Georgia, out-of-State banks would be prohibited from establishing such offices in this State and local State and national banks would be compelled to conform with the branch banking laws of the State (13.203.1 and 13-204.1 of the Code of Georgia) as they apply to branching.

Yours very truly,

W. M. Jackson
Superintendent of Banks

Enclosure
WMJ/mb

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief and Appendix was furnished, on behalf of Respondents Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland, by air mail, postage prepaid, this ..... day of ....., 1969, to Robert S. Edwards, Esquire, Post Office Box 1119, Plant City, Florida 33566, Attorney for Petitioner The First National Bank in Plant City, and to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, Attorney for Petitioner William B. Camp, Comptroller of the Currency.

.....

WM. REECE SMITH, JR.
Attorney for Respondents, Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
P. O. Box 3239
Tampa, Florida 33601